SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1943.

No. 18

FRANK ROBERTS,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

Certiorari to the United States Circuit Court of Appeals,
Fifth Circuit.

BRIEF AND ARGUMENT OF PETITIONER ON THE MERITS.

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INDEX.

Cases Cited.

Textbooks Cited.

Statutes Cited.

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OPINIONS BELOW.

The report of the opinion of the Circuit Court of Appeals on this case is as follows:

Roberts v. United States, 131 Federal (2d) 392, Dissenting Opinion, page 393.

QUESTIONS PRESENTED.

1. Under Title 18, Section 725, of the United States Code, can a District Judge revoke the probation of one sentenced for a criminal offense, and impose upon him a longer sentence than that originally imposed, if a fine was im-

posed upon the prisoner at the time of the original sentence, and the fine has been paid, and the term has ended?

2. Does Title 18, Section 725, of the United States Code violate the provision of the Fifth Amendment against putting one in jeopardy twice for the same offense, when a part of a sentence against one has been executed by the payment of the fine where a fine and a prison sentence were imposed concurrently for the same offense, and the term has ended?

3. When one is fined and sentenced to imprisonment for an offense, and the fine is paid and the execution of the prison sentence is suspended and the prisoner placed upon probation, and the probation is later revoked, after the term has ended, can a longer sentence be imposed upon him than the original sentence without violating the provision of the Fifth Amendment to the Constitution against double jeopardy?

ASSIGNMENT OF ERRORS.

1. The Circuit Court of Appeals for the Fifth Circuit erred in holding that under Title 18, Section 725, of the United States Code a District Judge could revoke the probation of one who had been fined and who had a sentence placed upon him for a criminal offense, and who had been placed on probation after the fine had been paid, and that a longer prison term could be imposed upon the prisoner than was originally imposed, all of this being after the term of the court at which the original sentence was imposed.

2. The Circuit Court of Appeals of the Fifth Circuit erred in holding that Title 18, Section 725, of the United States Code does not violate the provision of the Fifth Amendment against double jeopardy, in so far as it applies to increasing a prison sentence after term time when a part of the original sentence has been executed.

3. The Circuit Court of Appeals for the Fifth Circuit erred in holding that where a fine and a prison sentence are concurrently imposed as punishment for a crime the payment of the fine is not a partial execution of the sentence.

4. The Circuit Court of the Fifth Circuit erred in holding that Title 18, Section 725, of the United States Code applies so as to give authority to a District Judge to impose a longer prison sentence upon one than was originally imposed after the term at which the original sentence was imposed when a fine was concurrently imposed as a part of the original sentence, and the fine has been paid.

SUMMARY OF ARGUMENT.

The provision of the Probation Statute, which gives authority to a trial judge to resentence a prisoner during the term of probation, giving any sentence which might have originally been given, does not apply to cases where a part of the sentence has been executed, as in this case, for to hold such would declare that part of the Probation Statute referred to unconstitutional, as violating the provision of the Constituting prohibiting the punishment of a person twice for the same offense.

ARGUMENT.

We are all familiar with the provision of the United States Constitution which prohibits the punishment of one twice for the same offense. This is a provision placed in the Constitution which was a product of our common law. This Court has said that if there is anything settled in the jurisprudence of England and America it is that no man can be twice lawfully punished for the same offense.

Ex parte Lange, 85 U. S. 163, 21 Law. Ed. 872.

This case also states, "The protection against the action of the same court in inflicting punishment twice must surely be as necessary, and as clearly within the maxim, as protection from chances or danger of a second punishment on a second trial." Thus we see that this almost universal maxim protects a prisoner from the action of a court in imposing more than one sentence upon him just as much as it protects him from being tried by a jury twice for the same offense.

After reviewing, analyzing and digesting the decisions of the state and federal courts discussing the subject of the power to amend, alter, change, modify or enlarge a sentence, the able, trained and discriminating annotator and reviewer, in 44 A. L. R. 1203, stated his considered judgment as follows:

> "It seems to be well established that a trial court is without power to set aside a sentence after the defendant has been committed thereunder, and impose a new or different sentence increasing the punishment, even at the same term at which the original sentence was imposed. A judgment which attempts to do so is void and the original judgment remains in force."

In Volume 24, C. J. S., page 118, the law is thus stated:

> "Where accused has entered on the execution of a valid sentence, the court cannot, even during the term at which the sentence was rendered, set it aside and render a new sentence."

In Alabama, where the case originated, the law is:

> "The power of the court to modify its judgments, except for the correction of clerical misprisions, or to amend nunc pro tunc for the purpose of making the record speak the truth, ceases at the expiration of the term. A judgment imposing punishment cannot be pronounced by piecemeal at different terms; and after the expiration of the term the court is without power to substitute another kind of punishment for that first imposed. People v. Felker, 61 Mich. 110. The judgment or sentence pronounced during the term must embrace the entire punishment imposed."
>
> Ex parte State, In re Newton, 94 Ala. 431, 433.

To the above we add the following language of the Supreme Court of the United States:

> "Archbold, in his treatise, thus announces the law: 'The court may, at any time during the same sessions or assizes or any adjournment thereof, vacate the judgment passed upon the defendant before it has become matter of record, and pass another less or even more severe. But when once the judgment is solemnly entered on the record no court can make any alteration in it.'"
>
> "The power of the court having been exhausted in the first sentence pronounced, the second sentence was wholly without jurisdiction and was in conflict with the Constitution.
>
> Const. U. S., Art. V;
> Shepherd v. People, 25 N. Y. 406;
> Kuckler v. People, 5 Park. Cr. 212.

"If there is anything settled in the jurisprudence of England and America it is that no man can be twice lawfully punished for the same offense. And though there have been nice questions in the application of this rule to cases in which the act charged was such as to come within the definition of more than one statutory offense, or to bring the party within the jurisdiction of more than one court, there has never been any doubt of its entire and complete protection of the party when a second punishment is proposed in the same court, on the same facts, for the same statutory offense."

"For of What Avail Is the Constitutional Protection Against More Than One Trial If There Can Be Any Number of Sentences Pronounced on the Same Verdict? Why is it that, having once been tried and found guilty, he can never be tried again for that offense? Manifestly, it is not the danger or jeopardy of being a second time found guilty. It Is the Punishment That Would Legally Follow the Second Conviction Which Is the Real Danger Guarded Against by the Constitution. But if, after judgment has been rendered on the conviction, and the sentence of that judgment executed on the criminal, he can be again sentenced on that conviction to another and different punishment, or to endure the same punishment a second time, is the constitutional restriction of any value? Is not its intent and its spirit in such a case as much violated as if a new trial had been had, and, on a second conviction, a second punishment inflicted?

"The argument seems to us irresistible and we do not doubt that the Constitution was designed as much to prevent the criminal from being twice punished for the same offense as from being twice tried for it."

Ex parte Lange, 85 U. S. 163; 21 L. Ed. 872, 878.

In a comparatively recent case this Court quoted at length and with approval the opinion in the Ex Parte Lange case and also said:

"Wharton in Criminal Pleading and Practice, 9th ed., Section 913, says: 'As a general practice, the sentence, when imposed by a court of record, is within the power of the court during the session in which it is entered, and may be amended at any time during such session, provided a punishment already partly suffered be not increased.' "

We are well aware of the provision of the Code cited by the Government (Sec. 725, Title 18, U. S. C. A.), which provides that the trial judge may, during the probation period, resentence a prisoner for any period for which he might have been sentenced originally; but this section cannot be interpreted to mean that a court has this authority after a part of the sentence in the case has been executed, and the prisoner has suffered this punishment, as the payment of the fine in this case. To argue that this may be legally done after a part of the sentence has been executed as in this case will make the above-cited section violate the provision of the Constitution just referred to, because the fine of the $250.00 was paid in this case under the sentence of April 26, 1938, and under the argument of the Government in their brief in this case, the trial court has authority to resentence the prisoner on June 19, 1942, to "any sentence which might originally have been imposed." The Court could, therefore, impose the maximum penalty of five years plus the maximum fine provided by the statute in this case, which would mean that the prisoner would be subjected to suffering the maximum sentence in the case plus the $250.00 fine, the judgment of the Court, which has been paid. Of course, this would violate the constitutional prohibition against inflicting punishment upon a prisoner twice for the same offense, and would not be permitted. Therefore, the only conclusion to be reached is that the section of the Code giving authority to the Court to resentence a prisoner who has been placed on

probation to more punishment than originally inflicted applies only where a part of the sentence has not been executed. It is argued that since the maximum sentence was not imposed in this case, the Court had authority to continue raising the sentence until it reached the maximum sentence allowed in such case. This argument is sound if a part of the sentence has not been executed, for Congress has authority to make such statute so long as it does not violate the Constitution; but if, as in this case, a part of the sentence has been executed by the payment of a fine or otherwise, the argument of the Government must necessarily change from the contention that the Court may impose any sentence that might have been originally imposed to the contention that it may impose any sentence which, added to the part of the sentence which has been executed, will total the maximum sentence provided for in the case in question. When this argument is made, they have no authority for it, because the Probation Statute cited by the Government says that any sentence may be imposed which might originally have been imposed. This gives authority to impose the maximum penalty on the second sentence, even though a part of the former sentence has been executed, or it gives no authority at all; and we are led back to the same conclusion reached above, to wit, that the Congress did not intend to pass an act which would permit punishment of a man twice for the same offense, and, therefore, the statute applies only where a part of the original sentence has not been executed.

"The distinction that the court during the same term may amend a sentence so as to mitigate the punishment, but not so as to increase it, is not based upon the ground that the court has lost control of the judgment in the latter case, but upon the ground that to increase the penalty is to subject the defendant to double punishment for the same offense in violation of the Fifth Amendment to the Constitution, which provides that no person shall 'be

subject for the same offense to be twice put in jeopardy of life or limb.'"

United States v. Benz, 282 U. S. 304, 75 L. ed. 354, 356.

This rule not only obtains in the decisions of the Supreme Court of the United States and the Supreme Court of Alabama, and the textbooks, but is the rule adopted by other courts. From the case of Re Jones, 53 N. W. 468, we quote:

> "While a district court has ample authority to correct a judgment in a criminal case at the term of court at which it was rendered, or a subsequent term, to make the same conform to the one actually pronounced, it has no jurisdiction to vacate a judgment in a criminal case after the same has gone into effect by commitment of the defendant under it, and substitute for it another sentence at the same term of court. The power of a court to revise or change a judgment in a civil case is at an end after the same is in process of execution. The last sentence was illegally imposed, and its enforcement is without authority of law. To sustain the second judgment would be to hold that a person can be twice punished by judicial proceedings for the same offense. The fundamental law of the state, as well as that of the United States, forbids that one shall be put twice in jeopardy for the same act. In re Mason, 8 Mich. 70; Brown v. Rice, 57 Me. 55; State v. Cannon (Or.), 2 Pac. Rep. 191; People v. Whitson, 74 Ill. 20; Com. v. Weymouth, 2 Allen 147; People v. Lipscomb, 60 N. Y. 559; People v. Jacobs, 66 N. Y. 8; Ex Parte Lange, 18 Wall. 163; People v. Meservey, 76 Mich. 223, 42 N. W. Rep. 1133; People v. Kelley (Mich.), 44 N. W. Rep. 615."

In People v. Sullivan, 106 N. Y. Supp. 143, the defendant, having been sentenced to the penitentiary for a term of two months, on a motion to vacate and set aside the judgment and to impose a sentence of a different character and for a longer term, the Court held:

"A preliminary objection to the consideration of this motion on the merits is taken in behalf of the defendant, based on the contention that this court, after the pronouncement of sentence of imprisonment, is without power to revoke the sentence for the purpose of imposing a heavier one, where the sentence is itself lawful and has been in part executed by the commencement thereunder of the imprisonment of the defendant. . . . The objection to the exercise of such power by the court is that, could it be exercised, a defendant, in violation of his constitutional rights, might be punished twice for the same offense, first by undergoing imprisonment under the first sentence, and then by undergoing imprisonment under the second. . . . 'It is but fair and reasonable to presume that in the interim between its rendition and attempted annulment and vacation the defendant had, according to its terms, either paid the fine and costs imposed, or been held in custody by the sheriff in default of such payment. If So, in Either Event He Had Suffered Some Punishment Under Said Judgment, and It Was Then Beyond the Power of the Court Either to Set It Aside, Vacate, Annul, or Change It in Any Substantial Respect, unless at the instance or on motion of the defendant.' . . . I am inclined to the view that this preliminary objection is well taken and sustained by authority. This view constrains me to deny the present motion."

EXECUTION OF SENTENCE ENTERED UPON.

It does not seem to be questioned that a fine is a punishment, as the authorities are universal in holding that a fine is a punishment.

Words and Phrases, Vol. 17, p. 36:

"A fine is a pecuniary punishment imposed by a lawful tribunal upon a person convicted of a crime or misdemeanor."

United States v. Mitchell, 163 Fed. 1014.

The Government devotes much time in their brief to the holding of the Supreme Court that a trial court may change a sentence from a larger one to a smaller one after the term of court at which it was originally entered, and they cite United States v. Antinori, 59 F. (2) 171, to this effect. This holding is sound, indeed, for in such case the Court is not punishing a man twice for the same offense; on the contrary, the opposite takes place. We do not have a constitutional question in such case; therefore, there is no analogy between such case and the one at bar. Too, it is noted in reading the Antinori case that the Court refuses to go on record as inferring that such sentence might be increased, though it could be decreased.

Where the accused has entered on the execution of a valid sentence the Court cannot, even in term time at which it was rendered, set it aside and render a new sentence.

Simmons v. United States, 89 F. (2) 591, certiorari denied 58 S. Ct. 19, 302 U. S. 700, 82 L. Ed. 540;
Cisson v. United States, 37 F. (2) 330;
Hynes v. United States, 35 F. (2) 734, citing Corpus Juris;
Miller v. Snook, 15 F. (2) 68;
Zerbst v. Sullivan, 82 L. Ed. 1094;
24 Corpus Juris Secundum, p. 118, Note 57.

The Supreme Court says that the basis for allowing a court to reduce the punishment first inflicted, and denying it the power to increase it, is the fact that in the latter case the accused would be subject to double punishment.

United States v. Benz, 51 S. Ct. 113, 282 U. S. 304, 75 L. Ed. 354.

Where a jail sentence and a fine were both imposed upon a prisoner for the violation of the law, the payment of the fine was held a partial execution of the sentence.

Silver v. State, 295 Pac. 311, 37 Ariz. 418.

In the case of Ex parte Lange, supra, where the Court imposed the maximum sentence of fine and imprisonment, and the fine was paid, and five days of the imprisonment was served, and he was again sentenced to one year imprisonment (no further fine) from the date of the first sentence five days later, the Supreme Court said:

> "The petitioner, then having paid into court the fine imposed upon him of $200.00, and that money having passed into the Treasury of the United States, and beyond the legal control of the court, or of anyone else but the Congress of the United States, and having also undergone five days of the one year's imprisonment, all under a valid judgment, can the court vacate the judgment entirely, and without reference to what has been done under it, impose another punishment upon the prisoner on that same verdict? To do so is to punish him twice for the same offense. He is not only put in jeopardy twice, but put to actual punishment twice for the same thing."

In other words, the Supreme Court holds that such procedure violates the provision of the Constitution against double punishment for the same offense. The above facts would have been per case at bar exactly if the Court had chosen to exercise the power which the Government argues he had on the second sentence in this case, to wit, to "impose any judgment which originally might have been imposed in the case." The fact that the prisoner in this case was not given the maximum sentence on the second sentence does not change the principle which governs this case.

EXECUTION OF SENTENCE ENTERED UPON.

The sentence imposed was:

> "Defendant . . . is hereby committed to . . . imprisonment . . . for the period of Two (2) years, and to pay a fine of Two Hundred Fifty ($250.00) Dollars, to stand committed on May 25, 1938."

The fine was paid and on May 26, 1938 (the day following commitment), the "prison sentence" was suspended. The payment of the fine of two hundred and fifty dollars was an integral part of the punishment imposed. A part of the imposed punishment was executed. This cannot be annulled and restored by the Court. Having executed a part of the complete penalty, the Court was without power to increase the penalty four years afterwards.

The defendant was "committed" on May 25, 1938, and on the following day the prison part of the sentence was suspended. He paid the fine and suffered some punishment under the judgment. In a similar situation the New York Court said:

> "It is but fair and reasonable to presume that in the interim between its rendition and attempted annulment and vacation the defendant had, according to its terms, either paid the fine and costs imposed, or been held in custody by the sheriff in default of such payment. If so, in either event, he had suffered some punishment under said judgment, and it was then beyond the power of the court either to set it aside, vacate, annul, or change it in any substantial respect, unless at the instance or on motion of the defendant."
>
> People v. Sullivan, 106 N. Y. Supp. 143.

After the fine was paid defendant stood committed for one day, the Court was without power to open up that judgment and impose another and increased punishment.

> "To do so is to punish him twice for the same offense. He is not only put in jeopardy twice, but put to actual punishment twice for the same thing."
>
> U. S. v. Benz, 282 U. S. 304, 75 L. Ed. 354, 357.

As was said by the Court in In re Jones, 53 N. W. 468, 469:

> "It has no jurisdiction to vacate a judgment in a criminal case after the same has gone into effect by

commitment of the defendant under it and substitute for it another sentence."

The fact that defendant only executed a small part of the imposed sentence by paying the fine and standing committed for only one day is immaterial. This is irrefutably shown by the following quotation:

> "The beginning of the service of the sentence in a criminal case ends the power of the court even in the same term to change it."
>
> "It is true that there was but one day of execution of the sentence in the Murray Case, but the power passed immediately after imprisonment began, and there had been one day of it served."
>
> United States v. Murray, 275 U. S. 347, 72 L. Ed. 309, 313.

CONCLUSION.

Therefore, the inevitable conclusion is that the provision of the Probation Statute, which gives authority to a trial judge to resentence a prisoner during the term of probation, giving any sentence which might have originally been given, does not apply to cases where a part of the sentence has been executed, as in this case, for to hold such would declare that part of the Probation Statute referred to unconstitutional, as violating provision of the Constitution prohibiting the punishment of a person twice for the same offense.

"There is no more sacred duty of a court than, in a case properly before it, to maintain unimpaired those securities for the personal rights of the individual which have received for ages the sanction of the jurist and the statesman; and in such cases no narrow of illiberal construction should be given to the words of the fundamental law in which they are embodied. Without straining either the Constitution of the United States or the well-settled prin-

ciples of the common law, we have come to the conclusion that the sentence of the Circuit Court under which the petitioner is held a prisoner was pronounced without authority, and he should, therefore, be discharged."

Ex Parte Lange, 85 U. S. 163, 21 L. Ed. 782, 789.

Respectfully submitted,

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